85-776

No. .....

Supreme Court, U.S.
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Clerk

In The

Supreme Court of the United States

October Term, 1985

BLAIR VARNES,

Petitioner,

v.

GEORGE ROSS FORBES, JR., Individually and as Chairman of the Illinois State Employees Retirement System and the Board of the State Employees Retirement System; and MICHAEL MORY, Individually and as Executive Secretary of the Illinois State Employees Retirement System and the Board of the State Employees Retirement System; MICHAEL BAKALIS; DONALD THANNEN; CLASCENNA HARVEY; THEODORE PUCKORIUS; WILLIAM M. DOYLE, President of the Retirement Board, Cook County Employees Annuity and Benefit Fund; THOMAS BECK; ROBERT SOLDAT; and EDWARD ROSEWELL, Individually and as Trustees of said Retirement Board, Cook County Employees Annuity and Benefit Fund; and ROBERT A. MORAN, Individually and as Secretary and Treasurer of said Retirement Board, Cook County Employees Annuity and Benefit Fund,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court erred in applying federal preclusion law to determine the preclusive effect of a prior state court action on a subsequent federal claim contrary to *Migra*.

2. Whether Judge Varnes' federal cause of action is barred by the doctrine of *res judicata*.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Blair Varnes, by and through his attorney, Walter P. Maksym, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reprinted in full in the appendix hereto. (Appendix pp. 1-12.)

———o———

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 5, 1985. (Appendix p. 1.)

No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1) to review that decision.

———o———

STATUTORY AND OTHER PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981 provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, priviliges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action in law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985 provides in pertinent part:

> If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his prop-

> erty so as to molest, interrupt, hinder, or impede him in the discharge of his official duties.

Illinois Revised Statute 1971, Chapter 108½, § 20-125 provided in pertinent part:

> If a retired employee returns to employment which is covered by a system from which he is receiving a proportional annuity under this article his proportional annuity from all participating systems shall be suspended during the period of re-employment.

Illinois Revised Statute 1971, Chapter 108½, § 14-108(4) provided in pertinent part:

> . . . "a judge of a court of record in this State or person receiving a pension or annuity from the State because of such service" is *excluded* from the definition of the term "employee". . . . (Emphasis supplied)

Federal Rule of Civil Procedure, 56(e), provides in pertinent part:

> . . . Sworn or certified copies of all papers or parts thereof . . . *shall* be attached thereto and served therewith. . . . (Emphasis supplied)

STATEMENT OF THE CASE

The facts in the instant case are not in dispute and most of them are reported in two Illinois Appellate Court decisions. See *Varnes v. Lentz,* 30 Ill.App. 3d 806, 302 N.E.2d 639 (2nd Dist 1975), (Varnes I); *Varnes v. Dougherty,* 39 Ill.App. 3d 476, 350 N.E.2d 6 (1st Dist. 1975), (Varnes II). See also, opinion of the United States Court of Appeals for the Seventh Circuit rendered in this case, (Appendix pp. 1-12).

Judge Varnes earned retirement benefits from both the County of Cook and the State of Illinois. With respect to his Cook County pension, Judge Varnes was advised by the County Board on or about September 6, 1962, that he would receive approximately $509.14 per month for life. This was determined in a resolution of the County Board, and said resolution has never been altered or amended. Judge Varnes had also earned credits in the State Employees Retirement System of Illinois. When he reached the age of 60, the State Employees Retirement System began paying $64.66 per month to the County as reimbursement for its proportionate share of Appellant's annuity.

In October of 1971, the State Employees Retirement System was notified that Judge Varnes had been appointed associate judge for DuPage County, Illinois. This appointment prompted the Defendants to suspend Judge Varnes' retirement benefits. The suspension was purportedly based on Section 20-125 of the Illinois Pension Code, Ill.Rev. Stat. 1971, Chapt. 108½, §20-125. That section provides in pertinent part as follows:

> If a retired employee returns to employment which is covered by a system from which he is receiving a proportional annuity under this article his proportional annuity from all participating systems shall be suspended during the period of re-employment.

Judge Varnes did not receive any notice that the Defendants were going to suspend his benefits before the suspension. As the district court, state and federal appellate court opinions reveal, Judge Varnes was never given an opportunity to be heard on the issue of whether his benefits should be suspended. The first evidence Judge Varnes received of the suspension was a copy of a letter from the

Secretary of the State Employees Retirement System of Illinois to the head clerk of the County Employees Annuity and Benefit Fund of Cook County. This letter is dated October 19, 1971, and Judge Varnes is designated in the letter as having received a carbon copy. The letter discloses both Judge Varnes' appointment as a magistrate and states that he already has been removed from the state pension roll, presumably pursuant to §20-125.

Judge Varnes then sought further information concerning the suspension and he received an explanation of it in a letter dated January 18, 1972, from the Secretary of the State Employees Retirement System of Illinois. By this time, unbeknowst to Judge Varnes, as the defendants would later contend, the 35-day statutory period for administrative review had run, but the period for instituting a civil rights claim was still open.

Following the receipt of the above-mentioned correspondence, Judge Varnes filed an action against the state defendants in the Circuit Court of DuPage County, seeking a declaratory judgment to determine if he was entitled to continue to receive his retirement benefits while drawing his judicial salary. Judge Varnes prevailed in the trial court; however, the Illinois Appellate court reversed, holding as a matter of first impression, that the Administrative Review Act applied to actions of the State Retirement Board taken via its October 19th letter, and therefore, that administrative review was Judge Varnes' only mode of seeking judicial review of the State Retirement Employees Board's "decision". The court ruled that Judge Varnes' declaratory judgment action was improper and should have been dismissed as being barred by the Administrative Review Act's extremely short 35-day stat-

ute of limitations. *Varnes v. Lentz,* 30 Ill.App. 3d 806, 332 N.E.2d 639 (1975).

While *Varnes I* was pending in the appellate court, Judge Varnes filed an action in the Circuit Court of Cook County against the county defendants. In that action, he also sought a declaratory judgment stating that his retirement benefits had been wrongfully terminated. Similarly, Judge Varnes prevailed in the trial court, but the appellate court reversed. The First District Appellate Court followed the earlier panel's opinion from the Second District and held that Judge Varnes' *only* method of review was pursuant to the Illinois Administrative Review Act and that his complaint for declaratory judgment was not such an application for said review and likewise, because that Act requires that a complaint for administrative review be filed within 35 days of the "decision" sought to be reviewed, Judge Varnes was precluded from state judicial review of the Board's "decision" (copy of a letter).

Following the termination of the litigation in the appellate court, on December 2, 1977, Judge Varnes filed his complaint in federal court, alleging deprivation of property interests and violations of Title 42 and the Fifth and Fourteenth Amendments against both the state and county defendants.

In summary, the basis of Judge Varnes' complaint in the federal court was that his past pension benefits had been denied by both the state and the county defendants without prior notice, opportunity to be heard, or a statement of reasons why he was no longer qualified for said pension benefits.

Judge Varnes also alleged a further ground that §20-125 of Chapter 108½ did not apply to him because that

section *only applies to employees* and that *a judge, by definition, is excluded from the definition of employee.* Thus, he could not have been "re-employed" within the meaning of the Act, which fact rendered the termination of his pension benefits arbitrary and illegal.

Subsequent to the district court's denial of a motion to dismiss, cross-motions for summary judgment were filed. The trial court granted the defendants' motion for summary judgment and denied Judge Varnes' motion for summary judgment. (See Memorandum Opinion, Appendix pp. 12-20.) Judge Varnes appealed from that order and a subsequent order declining reconsideration to the United States District Court for the Seventh Circuit. These orders were affirmed. (See Memorandum Opinion, Appendix pp. 1-12.) Judge Varnes seeks review by this Court of the above-referenced decisions.

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REASONS FOR GRANTING THE PETITION

I.

The Trial Court Erred In Applying Federal Preclusion Standards To Determine The Preclusive Effect Of A Prior State Court Action On A Subsequent Federal Action Contrary To "Migra"

It is Petitioner's position that in an action based on 42 U.S.C. §1983, a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered. In order to do so, the federal court must apply state law to determine the scope, if any, of the pre-

clusive effect of the state court judgment. *Migra v. Warren City School District Board of Education*, — U.S. —, 104 S.Ct. 892 (1984). *Migra* is dispositive here. In *Migra*, the United States District Court for the Northern District of Ohio granted defendant's motion for summary judgment on the basis of *res judicata*. The United States Court of Appeals for the Sixth Circuit, by a short and unreported order, affirmed. The United States Supreme Court reversed, holding that state preclusion law must be applied to determine the preclusive effect of a prior state court judgment on a subsequent federal claim. The court found that because *the District Court's opinion* did not indicate whether it relied on state or federal preclusion law, it could not be determined whether the district court applied state law to determine the preclusive effect of the prior state court judgments. This court remanded the cause to the district court, noting specifically that the application of state preclusion law *must* be performed initially in the district court.

In the instant case, it is clear that the district court applied the federal law of preclusion to determine the preclusive effect of the prior state court judgment. In its decision, the district court cited and relied upon federal cases only. The district court did not make any reference to state law in its discussion of *res judicata*.

Migra dictates that this cause be remanded to the district court for a determination of the preclusive effect of the prior state court actions. As will be shown later in this Petition, a proper application of state law would result in a finding that the doctrine of *res judicata* does not apply to Judge Varnes' federal claim. Nowhere in the Seventh Circuit's opinion was the district court's duty under *Migra*

addressed, despite the fact that Judge Varnes advocated this contention as his first point of error on appeal. Rather, as will be shown in section II of this Petition, the Seventh Circuit in its efforts to rationalize the district court's ruling, *inter alia,* for the first time referenced some Illinois state court decisions but ignored those which were crucial to a correct determination.

II.

Petitioner's Federal Claims Should Not Be Barred Under The Doctrine Of Res Judicata

It is well settled that the doctrine of *res judicata* includes all matters which were or might have been determined in earlier litigation. *Cranwill v. Donahue,* 99 Ill. App. 3d 968, 426 N.E.2d 337 (1981). Yet, there *must be a judgment on the merits* which contains an identity of parties, an identity of subject matter and an identity of causes of action.

Here, the first element, "a judgment on the merits," and the third element, "same cause of action" in both suits were not met. It is obvious that the causes of action stated in Judge Varnes' instant case differ in kind from those raised in the state courts. The state courts determined that the only remedy of the plaintiff was administrative review. However, it should be noted that the trial court's power in an administrative review action is expressly limited to those powers specified by statute. *Chestnut v. Lodge,* 210 N.E.2d 336 (1965). The only limited jurisdictional remedy available in the administrative review proceedings is "review" of the administrative agencies' record, not "damages". Moreover, a

civil rights claim for damages cannot be joined with administrative review. *Appel v. Zoning Board of Appeals of City of Mattoon,* 120 Ill.App. 2d 401, 257 N.E.2d 219 (1970); *Thompson v. Roberts,* 91 Ill.App. 2d 93, 132 N.E. 2d 422 (1955).

Here, the Constitution and the Civil Rights Act create rights and remedies which were not raised and could not have been raised in conjunction with administrative review in the state court. No findings of fact exist in the state court's proceedings by virtue of the appellate court's reversals. Additionally, causes of action which are distinct but arise out of the same set of facts sued upon separately on one count will not bar subsequent action on all other counts. *Northern Trust Co. v. Essaness Theaters Corp.,* 103 F.Supp. 954 (1952); I.L.P. Judgments, Section 342, Page 386; *Wiggins Ferry Company v. Ohio and A.M. Railway Co.,* 142 U.S. 396 (1892). See also, *Failen v. United States,* 146 C. CLS. 218 (1959).

The Seventh Circuit failed to appreciate the fact that both the *Lentz* matter and that of *Dougherty* were terminated by orders of reversal. This is significant because it is clear under Illinois law that orders which are reversed, i.e. vacated, *are not res judicata of anything.* So, in this case, as the record shows, there are no judgments upon which preclusion may be predicated. See *Wigoda v. Cousins,* 14 Ill.App. 3d 460, 302 N.E.2d 614 at 622 (1973), wherein it was held:

> At the outset, *this court is requested to take judicial notice* that the judgment of the U.S. Court of Appeals for the District of Columbia Circuit, *upon which the defendants based their contentions, was subsequently vacated* by the U.S. Supreme Court and remanded to

> the Court of Appeals for further determination. . . . Then came the Supreme Court order vacating the Court of Appeals' order, thereby *rendering said order non-existent and a nullity*, as if it never existed. It was stricken from the records and of no force or effect. *Certainly such a vacated order could not be res judicata of anything.* (Emphasis supplied.)

So, the doctrine of *res judicata* must not only be plead but also proven. The burden of proof in federal summary judgment practice is on the moving party. *Adickes v. S. H. Kress and Company,* 398 U.S. 144, 90 S.Ct. 1598 at pp. 1606-1610 (1970). Where a defendant only submits a motion without proof, a *res judicata* claim will not stand. See also, *Wigoda, supra,* at 622. The burden under Illinois law, not met here, is that preclusion must be established "by clear and convincing evidence by the party invoking it". *Lester v. Arlington Heights Federal Savings & Loan Association,* 474 N.E.2d 33 at 37 (Ill.App. 2nd Dist. 1985).

Even *if* a judgment were proven, the fact it was reversed would have returned the *parties to the action to the same position as if no judgment had ever been rendered.* After reversal, a judgment no longer maintains any force; and the parties are restored to precisely the same situation as though no judgment had ever been entered, together with their original rights. See *Watkins v. Dunbar,* 318 Ill. 174. 149 N.E. 14 (1925); *Kaplan v. Joseph,* 125 F.2d 602 (C.C.A. Ill. 1942). Contrary to the mistaken analysis of the Seventh Circuit, which in essence took judicial notice of a non-existent document, the effect of a reversal is to abrogate the judgment—not reconstitute it. *People ex rel. Krych v. Birnbaum,* 428 N.E.2d 974 at 978 (1981). In Illinois, it has long been the law that the reversal of a judgment by the appellate court destroys its effect as an estoppel; the judgment no longer affects a merger of a cause of action and does not bar a second action on the same demand. See

Chicago Forge and Bolt Company v. Rose, 69 Ill.App. 123 (1896).

Here, no showing was ever made by any of the Respondents, pursuant to the requirements of Federal Rule of Civil Procedure, 56(e), that after reversal and remandment, orders were *in fact* entered to accomplish dismissal of Judge Varnes' complaint. Surely, if such critical events would have transpired, some reference would have been made to the existence of such orders. See *Santucci Construction Company v. Metropolitan Sanitary District of Greater Chicago*, 55 Ill.App. 3d 376, 371 N.E.2d 53 (1977); *Continental-Midwest Corporation v. Hotel Sherman, Inc.*, 13 Ill.App. 2d 188, 141 N.E.2d 400 (1957). Since *res judicata*, like orders of court, cannot be presumed, both the district and appellate rulings must be reversed. See *Lester, supra*.

The district court's and Seventh Circuit's improper application of the doctrine of *res judicata* has, in effect, imposed either a 35-day statute of limitation or a drastic imposition on civil rights claims arising in Illinois. For the district court to rule and the court of appeals to agree that Judge Varnes' civil rights claims are barred because of his failure to include them in an action for administrative review, which was determined to be an improper remedy, is tantamount to ruling that Judge Varnes' federal claims are barred because Judge Varnes failed to file his complaint for administrative review, a distinct proceeding, within 35 days. This is error. The Seventh Circuit's decision squarely conflicts with the decision of *Jimenez v. Toledo*, 576 F.2d 402 (1st Cir. 1978), which held that *res judicata* does not apply to bar a civil rights suit in federal court where, as here, a prior adjudication of a state court

was decided only on the basis of whether a state claim was time-barred and did not deal with the merits of the underlying suit. Accord, *Hartmann v. Time, Inc.*, 166 F.2d 127 (3rd Cir. 1949), *cert. denied*, 334 U.S. 838 (1948); *Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464 (3rd Cir. 1950), *cert. denied*, 341 U.S. 921 (1951). See also, *Restatement (Second) Judgments*, §19(f) and comment (f). Thus, a conflict now lives among the circuits.

When viewed in the context of a ruling which is a product of summary judgment practice, the Seventh Circuit's reasoning is particularly flawed. Under Federal Rule of Civil Procedure, 56(e), one *shall* present of record the document upon which he bases his request for summary judgment. Here, the Seventh Circuit did not merely relax application of the rule, it dispensed with any duty to comply with its mandatory provisions. See also *Adickes, supra*.

In addition to having erroneously presumed and concluded that a basis for preclusion existed, the Seventh Circuit ignored the duty of the defendant to plead and prove a judgment upon which a purported *res judicata* bar might be predicated. In failing to do so, the court of appeals thus compounded its error by viewing the absence of any state court judgment as "hypertechnical", (see Seventh Circuit Memorandum Opinion at page 5, Appendix p. 9), and thus, wrongfully shifted an impossible burden to Judge Varnes, the party opposing summary judgment, to disprove its non-existence.

The result of this analysis by the court of appeals was the anomalous conclusion that despite the undisputed denial of Judge Varnes' right to due process which directly deprived him of his pension, such deprivation could not be redressed unless he met the Herculeon test of establishing,

inter alia, that such deprivation prejudiced his "ability to demonstrate a meritorious position on administrative review". For the Seventh Circuit, the noted absence of a prior judgment, the want of due process and the loss of a retiree's pension are insufficient. Yet, it is liberality toward and forgiveness of the state defendants' multitude of shortcomings which establishes a pernicious double standard which is neither fair nor just. Its consequence and application to this Petitioner should not be permitted to stand.

The Seventh Circuit's subtle but dangerous relaxation and shift of the burden of proof under Federal Rule of Civil Procedure 56(e) with respect to the establishment of *res judicata* warrants scrutiny by this Court. Under *Jimenez, supra*, this action is not barred by the doctrine of *res judicata* since the causes of action stated in plaintiff's complaint are distinct from those raised in the state court. Defendants' failure to plead and prove a prior judgment on the merits coupled with their admitted denial of due process, prejudiced Petitioner's ability to demonstrate a meritorious position on or pursue administrative review.

Additionally, *Restatement (Second) of Judgments*, § 33(c)[1] provides in pertinent part:

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[1]Contrary to the interpretation of the Seventh Circuit, § 33(c) was cited on reconsideration, not as an additional ground, but rather as an *additional authority* to tighten focus on the absence of a sufficient state judgment upon which preclusion might be predicated. This *reductio ad absurdum* argument was advanced to highlight the fact that even if a judgment had been produced in compliance with Rule 56(e), it would still not have been of the kind which would justify preclusion under the unique circumstances of this case.

C. Effects as to matters not declared.

When a plaintiff seeks solely declaratory relief, *the weight of authority does not view him as seeking to enforce a claim against the defendant.* Instead, he is seen as merely requesting a judicial declaration as to the existence and nature of a relation between himself and the defendant. The *effect of such a declaration,* under this approach, *is not to merge a claim in the judgment or to bar. Accordingly, regardless of outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action.*

• • •

A litigant seeking a declaratory remedy when he could have maintained a conventional action for coercive relief often signifies that he is in a quandary not only as to what his rights and duties are, but also as to how to secure their adjudication. (Emphasis supplied.)

Here, § 33(c) of the *Restatement (Second) of Judgments* provides that Judge Varnes may be bound as to the matters actually declared, but beyond those precise matters, any preclusion with respect to the termination of issues should not extend to the additional relief requested against the parties not mentioned in the declaratory action. Therefore, preclusion should not extend to Judge Varnes' federal damage[2] claims against any of the defendants named herein due to the limited nature and lack of extensiveness of the prior state proceeding. See *Wozniak v. County of DuPage,* 569 F.Supp. 813 (N.D. Ill. 1983).

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[2]A damage remedy is a vital component of any scheme for vindicating cherished constitutional guarantees such as denials of due process. See *Owen v. City of Independence, Mo.,* 445 U.S. 622, at 651 (1980); *Carey v. Piphus,* 435 U.S. 247 (1978).

By interpreting the language of the Uniform Declaratory Judgment Act, which is effective in Illinois, a Missouri court recently reversed and remanded an order dismissing a separate and subsequent damage claim based based on the same cause of action. In *Farley v. Missouri Department*, 592 S.W.2d 539, 540 (1979), it was held:

> . . . suits for declaratory judgment do not fall within the general rule. *According to virtual unanimous authorities, the effect of a prior declaratory judgment, although conclusive as to matters declared, is not to merge in the judgment a subsequent claim for coercive relief arising out of the same cause of action.* (Citations omitted.) Id. at 540-541.

In overturning a summary judgment grounded on *res judicata*, the Supreme Court of Colorado in *Atchison v. City of Englewood*, 506 P.2d 140 (1973) overruled as unsound its prior decision that a declaratory judgment, *when plead*, barred by waiver all claims to further and additional relief on the same cause of action not raised. The *Atchison* court went on to hold:

> We reaffirm the rule that a declaratory judgment is conclusive as to the question raised by the parties and passed upon by the court. (Citation omitted.) *A declaratory judgment, however, does not constitute an absolute bar to subsequent proceedings where the parties are seeking other remedies, even though based upon the claims which could have been asserted in the original action.* (Lengthy citations omitted.) (Emphasis supplied.)

In *Lortz v. Connell*, 78 Cal. Rptr. 6 (1969), the court states:

> . . . It is generally recognized that since coercive relief may or may not be requested in an action for declaratory relief, *a party will not be barred from*

> *seeking such relief by further proceedings in the same or a new action. . . .*
>
> . . . The general rule referred to above, which *does not bar the right to subsequent coercive relief if it is not sought or litigated in the earlier action,* promotes this purpose. It enables a party to get a prompt adjudication *without a dispute over the damages suffered. . . .* (Emphasis supplied.)

Accord, North Shore Realty Corporation v. Gallagher, 99 So.2d 255 (Fla. App. 1957); *St. John v. Wisconsin Employment Relations Board,* 340 U.S. 411, 95 L.Ed. 396 (1951); *Curlott v. Campbell,* 598 F.2d 1175 (9th Cir. 1979); *Niebuhr v. State Farm Automobile Insurance Co.,* 486 F.2d 618 (10th Cir. 1973); *Security Mutual Casualty Company v. Century Casualty Company,* 621 F.2d (10th Cir. 1980); *Atchison v. City of Englewood,* 506 P.2d 140 (S.Ct. Colo. 1973); *Marshall v. Crotty,* 185 F.2d 622 (1st Cir. 1950); *State of Alabama v. Tennessee Valley Authority,* 467 F.Supp. 791 (1979); *Lortz v. Connell,* 78 Cal. Rptr. 6 (1969); *Schleicher v. Schleicher,* 120 Conn. 528, 182 A.2d 162 (1935); *In Re: Ditz Estate,* 125 N.W.2d 814 (1964); *Powell v. McCormack,* 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed. 2d 491 (1969); *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.,* 255 F.2d 518 (2nd Cir. 1958), *cert. denied,* 358 U.S. 831, 79 S.Ct. 51, 3 L.Ed. 2d 69 (1958); *Thomas v. Cilbe, Inc.,* 104 So. 2d 397 (Fla. 1958).

The policy underlying Illinois declaratory relief supports Petitioner's contention that, if ever faced with the issue, an Illinois court would more likely than not side with the overwhelming majority of jurisdictions which have recognized the "declaratory judgment exception". The *Restatement* supports this assertion in that it references an Illinois case *LaSalle National Bank v. County of*

DuPage, 77 Ill.App. 3d 562, 396 N.E.2d 48 (1979) in support of its position that all claims are not merged into the declaratory proceeding so as to prevent further suit.

The complaints in the state court did not seek damages but rather were brought pursuant to Illinois Uniform Declaratory Judgments Act, Illinois Code of Civil Procedure, § 2-701 (1982), (formerly known as Civil Practice Act, §57.1). Under Illinois law, declaratory relief is an optional non-coercive alternative remedy. The central purpose of this special legisltively created procedure is to allow "the court to take hold of controversy one step sooner than normally—that is, after the dispute has arisen, but before steps are taken which give rise to claims for damages or other relief. The parties to the dispute can then learn the consequences of their action before acting". [Ill.Ann.Stat., Ch. 110, par. 57.1, Historical and Practice notes at 132, (Smith Hurd, 1968)]. This unique statutory procedure adopted in over 40 states permits declaratory judgments to be rendered in instances where an "actual controversy" exists. The Illinois legislature designed this special procedure:

> . . . to afford security and *relief against uncertainty with a view to avoiding litigation*, rather than an aid of it, and to settle and fix rights before there has been any irrevocable change of position of the parties in disregard of their respective claims of rights, and thus promote peace, quiet and justice, with the end always constantly in view that *one of the chief purposes is to declare rights rather than to execute them.* (Emphasis supplied.)

[Ill.Ann.Stat., Ch. 110, par. 57.1, Historical and Practice notes at 128, (Smith-Hurd 1968)]. See also, *Kaske v.*

The City of Rockford, 96 Ill. 2d 298, 450 N.E.2d 314 (1984).

Logically, the argument that no judgment whatsoever was introduced of record before the district court is identical to the contention that no "declaratory" state judgment has been plead of record by the defendants. Indeed, in their quest to give effect and meaning, where none existed, to the mere prior state court proceedings, the district and appellate courts appear to have evolved a new species of judicial thought. Under this new policy, the lethel preclusion bar is to be used in situations where no actual judgment is plead or shown to exist under 56(e); but rather, the burden is shifted to a plaintiff to somehow justify his presence before a federal forum. This philosophy is inapposite to a citizen's right to seek judicial relief and sets a dangerous precedent.

Illinois law governed whether Judge Varnes had a property interest, and the Illinois Retirement Systems Reciprocal Act, § 20-125, read in isolation, provided a claim of entitlement to continued benefits as long as Judge Varnes was not "re-employed". Here, it is not fully accurate "that [Judge Varnes] was re-employed and that that re-employment was the basis of the defendants' action to suspend benefits". Nevertheless, the district court concluded that Judge Varnes had not shown a property interest sufficient to "implicate" due process protection.

Contrary to the district court's mistaken assumption, Judge Varnes was not, at the time of divestiture, an "employee" for purpose of the Pension Act; and his recall to the bench did not constitute "re-employment" for purposes of the Act. In his complaint, Judge Varnes pointed

out that under Chapter 108½, § 14-108(4) (1971) *"a judge of a court of record in this State or person receiving a pension or annuity from the State because of such service" is excluded from the definition of the term "employee".*[3]

In the landmark decision in *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1001, 25 L.Ed. 2d 287 (1970), this Court established that procedural due process requires that a pretermination hearing must be held before public assistance payments to a welfare recipient may be discontinued. The recipient must receive timely and adequate notice detailing the reasons for the proposed termination and must be given an effective opportunity to be heard. This Court in *Goldberg* stated:

> The constitutional challenge cannot be answered by an argument that public assistance benefits are a "privilege" and not a "right". 90 S.Ct. at 1017.

The applicability of the principles of *Goldberg* to the instant case where the subject matter in question is a pension is obvious. Here, Judge Varnes possessed a right to earned pension benefits—they were not a mere "privilege". In *Goldberg* this Court noted that procedural due process requires that adequate notice and a meaningful opportunity to be heard must be given before welfare benefits may be taken away. Clearly, where the benefits to be taken away are in the nature of a "right", at least the same requirements of notice and hearing as are set forth in *Goldberg* must be given prior to termination.

The recent case of *Wendl v. Moline Police Pension Board,* 96 Ill.App. 3d 482, 421 N.E.2d 584 (3rd Dist. 1981)

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[3]In order to understand the limitation of § 20-125, it must be read in conjunction with § 14-108(4). It is evident that these defendants either overlooked or ignored such a reading.

involved the termination of pension benefits. The court in *Wendl* held that the *Goldberg* requirements of adequate notice and meaningful hearing were applicable:

> Plaintiffs herein had shown their entitlement to the pension benefits, and their interests in those benefits, present and future, are sufficient to require significant due process protection when the state, herein the Pension Board, seeks to deprive the plaintiffs of them. Note that we do not mandate that the hearing must take the form of a judicial or quasi-judicial proceeding. *What the Board must do, prior to terminating benefits, is to provide meaningful notice and a meaningful opportunity to be heard.*
>
> • • •
>
> Perhaps the most essential due process protection is that of adequate notice concerning the actions contemplated. (Emphasis supplied.)

In the instant case, the due process violations are even more egregious than in *Wendl*. Here, Judge Varnes neither received any notice nor was he given an opportunity to attend a hearing. Therefore, it is beyond question that the defendants here have deprived Judge Varnes of his rights without complying with the requirements of due process. Further, Illinois makes no distinction between the right to be heard on the basis of "question of fact" versus "question of law." Thus, the Seventh Circuit's reasoning that the absence of a hearing made no difference is wrong. The difference is the loss of a pension. Simply stated, had he been heard prior to the defendants' action, the outcome would have been different.

In this regard, it is somewhat bewildering that the Seventh Circuit first commented at page 5 of its opinion: (Appendix p. 8)

> . . . In sum, *had Varnes sought his exclusive remedy under the administrative procedure act in a timely*

> *fashion, he would have been able* to assert all the contentions necessary to achieve the same result he seeks now. In addition, if his position was meritorious, he would have had no reason to rely on his current due process theory. . . . (Emphasis supplied.)

Yet, contrariwise, it is also noted in a footnote at the same page in its struggle to rationalize its conclusion:

> [1]We note, however, that this line of reasoning might not be applicable *in a case in which the denial of a hearing itself might prejudice a plaintiff's ability to demonstrate a meritorious position on administrative review; in such a case the federal cause of action for deprivation of due process might indeed be different from the cause of action* pursued before the state court on administrative review. (Emphasis supplied.)

Under Illinois law, administrative review is not a traditional "cause of action" but rather a remedial statutory device. This subtle distinction must be noted. Petitioner submits that Respondents' act of denying him due process, i.e., notice and hearing by rendering its "decision" via a mere copy of an informal letter prejudiced not only his ability to appear before the administrative tribunal but also his ability to recognize a need to timely file an action for administrative review in order to preserve and advocate his rights. This is unjust.

It is precisely the unorthodox and illegal action of the administrative agency in failing to give Judge Varnes notice by communicating the *fait accompli* by its October 14th letter that triggered the commencement of the hyper-short 35-day statutory period. Since no Illinois court had ever previously construed such a letter as a "decision", this particular denial of due process was unreasonably subtle and frustrating.

Though Judge Varnes, a learned and experienced jurist, sought further information, his opportunity for administrative review of the "decision," admittedly rendered in violation of his right to due process, disappeared by the time he received the defendants' January 18th explanatory letter. The profound irreversable effect this was to have on his pension rights could not have been reasonably anticipated by him at that time since, they would have yet to be decided as matters of first impression by various appellate courts. These rulings reversed the orders of two judges who had restored his rights on, no doubt, the application of a broader, less ruthless and more flexible principles of justice than those resorted to in this case. Surely, if travesties such as this are spawned by such judicial hindsight and this ultra-liberal application of the preclusion doctrine is allowed to flourish, each and every citizen and, indeed the promise of our legal system, is threatened. It is with hope that this Court's fundamental commitment to substance over form and to enlightened justice over mere legal logic will spur favorable consideration of this Petition and in so doing quell a conflict of philosophy among the circuits.

Perhaps these prophetic words of Judge Learned Hand and Judge Herbert Goodrich are the most appropos:

> . . . it appears to us that the doctrine of *res judicata* . . . must be treated as a compromise between two conflicting interests; the convenience of avoiding a multiplicity of suits and the adequacy of the remedies afforded for conceded wrongs.

Lyon v. Westinghouse Electric Corp., 222 F.2d 184, 189 (2nd Cir. 1955).

> Such a rule of public policy must be watched in its application lest a blind adherence to it tends to defeat the even firmer established policy of giving every litigant a full and fair day in court.

United States v. Stillman, 167 F.2d 607, 614 (3rd Cir. 1948).

CONCLUSION

For the foregoing reasons, Petitioner, Honorable Blair Varnes, respectfully prays that his Petition for Certiorari be granted.

Respectfully submitted,

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November, 1985

APPENDIX

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 5, 1985.

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. REYNALDO G. GARZA, Senior Circuit Judge*

BLAIR VARNES,

Plaintiff-Appellant,

No. 83-3251 vs.

GEORGE ROSS FORBES, JR., Individually and as Chairman of the Illinois State Employees Retirement System and the Board of the State Employees Retirement System, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 4481

Judge George N. Leighton

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the order of this Court entered this date.

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* Honorable Reynaldo G. Garza, Senior Circuit Judge for the Fifth Circuit, is sitting by designation.

App. 2

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
ARGUED APRIL 16, 1985

August 5, 1985.

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. REYNALDO G. GARZA, Senior Circuit Judge*

BLAIR VARNES,

Plaintiff-Appellant,

No. 83-3251 vs.

GEORGE ROSS FORBES, JR., Individually and as Chairman of the Illinois State Employees Retirement System and the Board of the State Employees Retirement System, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77 C 4481

George N. Leighton, Judge

ORDER

This is an appeal from a final order which granted summary judgment to defendants primarily on the ground that this federal suit, alleging that defendants deprived plaintiff of his pension benefits without due process, is barred by the *res judicata* effect of two prior state court decisions. We affirm.

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* Honorable Reynaldo G. Garza, Senior Circuit Judge for the Fifth Circuit, is sitting by designation.

I.

The facts in this case are not in dispute and are fully reported in two Illinois Appellate Court decisions, *Varnes v. Lentz,* 30 Ill. App. 3d 806, 332 N.E.2d 639 (2d Dist. 1975) and *Varnes v. Dougherty,* 39 Ill. App. 3d 476, 350 N.E.2d 6 (1st Dist. 1976). Plaintiff, Blair Varnes, as an Assistant State's Attorney and Assistant Attorney General, earned retirement benefits from both the State of Illinois and Cook County. After he retired, Varnes began receiving county and state benefit payments. In 1970, he opted to accept a recomputation of his benefits and a lump sum payment under provisions of the Retirement Systems Reciprocal Act, Ill. Rev. Stat. ch. 108-½, § 20-101 *et seq.* On May 1, 1971, plaintiff was appointed a magistrate in the Eighteenth Judicial Circuit, DuPage County. That appointment prompted the defendants to suspend plaintiff's retirement benefits, pursuant to section 20-125 of the Illinois Pension Code. That section provides in pertinent part:

> If a retired employee returns to employment which is covered by a system from which he is receiving a proportional annuity under this Article, his proportional annuity from all participating systems shall be suspended during the period of re-employment.

III. Rev. Stat. ch. 108-½, § 20-125.

Mr. Varnes was not given any notice that his benefits were going to be suspended and so had no opportunity to be heard on that issue. The first notice plaintiff received was a carbon copy of a letter from the Secretary of the State Employees' Retirement System of Illinois to the Head Clerk of the County Employees' Annuity & Benefit

Fund of Cook County. The letter was dated October 19, 1971 and stated that plaintiff had been removed from the state pension roll. Plaintiff then sought further information concerning the suspension and received an explanation from the Secretary of the State Employees' Retirement System of Illinois in a letter dated January 18, 1972.

Subsequently plaintiff filed an action against the state defendants in the Circuit Court of DuPage County, seeking a declaratory judgment that he was entitled to continue receiving his retirement benefits. Although that court held in his favor, the Illinois Appellate Court reversed and remanded with directions to dismiss his complaint for the reason that plaintiff's only form of review was an action for administrative review and that plaintiff's complaint had not been filed within the applicable time period for obtaining such review. *Varnes v. Lentz,* 30 Ill. App. 3d 806, 332 N.E.2d 639 (2d Dist. 1975) (*"Varnes I"*). While that case was pending, plaintiff filed a separate action against the county defendants in the Circuit Court of Cook County. That suit slso sought a declaratory judgment that plaintiff's retirement benefits had been wrongfully terminated. Once again, the Illinois Appellate Court held that plaintiff's only method of review was pursuant to the Illinois Administrative Review Act, Ill. Rev. Stat. ch. 110, § 264 *et seq.,* and that plaintiff's complaint was not timely for such an action. *Varnes v. Dougherty,* 39 Ill. App. 3d 476, 350 N.E.2d 6 (1st Dist. 1976) ("Varnes II").

After these unsuccessful attempts in state court to restore his retirement benefits, plaintiff filed suit in the district court, pursuant to 42 U.S.C. § 1983, alleging deprivation of his constitutional right to due process. Plain-

tiff argued that he was denied procedural due process of law when his pension benefits were suspended without giving him prior notice and an opportunity to be heard. The parties filed cross-motions for summary judgment, and in a memorandum opinion the trial court granted defendants' motion for summary judgment. The court held that plaintiff's federal suit was barred by the *res judicata* effect of the earlier state court suits, and alternatively, that plaintiff had not shown a property interest which implicated federal due process. *Varnes v. Forbes,* No. 77 C 4481 (N.D. Ill. May 30, 1983). Plaintiff then filed a motion to alter or amend the judgment and for reconsideration of the order granting defendants' motion for summary judgment, pursuant to FED. R. CIV. PRO. 52(b) and 59(e). That motion was denied after briefing and argument. *Varnes v. Forbes* No. 77 C 4481 (N.D. Ill. Nov. 18, 1983). Plaintiff now appeals both from the order granting defendants' summary judgment and from the order denying his motion for reconsideration.

II.

A federal court must give a state court judgment the same *res judicata* effect that it would be given by the courts of the rendering state. *Migra v. Warren City School District Board of Education,* — U.S. —, 104 S. Ct. 892 (1984). This rule applies to section 1983 actions with respect to issues that could have been litigated in prior state court proceedings as well as to those actually litigated. *Id.,* 104 S. Ct. at 898; *Vandenplas v. City of Muskego,* 753 F.2d 555, 559 (7th Cir. 1985), *cert. denied,* — S. Ct. — (1985); *Lee v. City of Peoria,* 685 F2d 196, 198-99 (7th Cir. 1982). Hence we turn to Illinois law to deter-

mine whether the courts of that state would find the present action barred by the *res judicata* effect of *Varnes I* and *Varnes II*.

The essential elements of *res judicata* under Illinois law are: 1) a final judgment on the merits in an earlier action, 2) an identity of the cause of action in both the earlier and later suit, and 3) an identity of parties or their privies in the two suits. *Lee v. City of Peoria,* 685 F.2d at 199; *Morris v. Union Oil Co. of California,* 96 Ill. App. 3d 148, 154, 421 N.E.2d 278, 282 (5th Dist. 1981). Where these requirements are met, no issue that was or could have been litigated in the earlier action can be raised in a subsequent proceeding. *Morris v. Union Oil Co. of California,* 96 Ill. App. 3d at 154, 421 N.E.2d 278 at 282. The requirement of identity of the parties is undisputed. Plaintiff argues, however, that his cause of action is different in this case than it was in the state court suits. He contends that the only remedy available in the administrative review actions in the state courts was "review of the administrative agencies' decision itself," while in this suit he brings a civil rights action to contest the deprivation of his constitutional due process rights.

But the assertion of different theories of recovery does not amount to a statement of different causes of action. As defined by Illinois law,

> a cause of action consists of a single core of operative facts which give the plaintiff a right to seek redress for the wrong concerned. Even though one group of facts may give rise to different claims for relief upon different theories of recovery, there remains a single cause of action. If the same facts are essential to the mainteance of both proceedings or the same evidence is needed to sustain both, then there is identity be-

tween the allegedly different causes of action asserted, and *res judicata* bars the latter action.

Morris v. Union Oil Co. of California, 96 Ill. App. 3d 148 at 157, 421 N.E.2d 278 at 285. Illinois courts also use a "proof" test (whether the same evidence would sustain both actions) and a "transactional" test (whether both suits arose from the same transaction, incident or factual situation). *Hagee v. City of Evanston,* 729 F.2d 510, 513 (7th Cir. 1984).

Under any of these formulations, plaintiff's current suit asserts the same cause of action as was pressed in *Varnes I* and *Varnes II.* In all three suits the transaction giving rise to plaintiff's complaint is the suspension of his retirement benefits upon his appointment as a magistrate. In each suit plaintiff would have to establish the same facts and would argue for the same interpretation of the Illinois pension provisions. Although the current suit is styled a civil rights action, plaintiff seeks the same remedy as he pursued in the state courts—the reinstatement of his suspended benefits.

Varnes attempts to avoid this conclusion by arguing that the federal claim that he was denied procedural due process could not have been raised during the state courts' review of the administrative decision suspending his benefits. But, as the district court recognized, "[e]ven though the Illinois courts considered plaintiff's state court complaints as administrative review actions, those courts had 'a duty, under the Administrative Review Act, to ensure that due process and an impartial adjudication were afforded in the administrative hearing.' " *Varnes v. Forbes,* No. 81 C 4481 (N.D. Ill. May 30, 1983) (Mem. Opinion at 5, n.3) (quoting *Lee v. City of Peoria,* 685 F.2d at 201).

See also Reich v. City of Freeport, 527 F.2d 666, 671 (7th Cir. 1975).

The fact that the state courts' review would have been limited to evidence contained in the administrative record, *see Reich v. City of Freeport,* 527 F.2d 666, 671 (7th Cir. 1975), would not have hindered Varnes in his quest for reinstatement of benefits. He could have made his constitutional arguments on administrative review, and, if the courts thought more evidence was necessary to determine those claims, they had the power to remand the case to the agency for further evidence. *Id.* Moreover, the facts relating to his claim were undisputed; the only issue was one of statutory interpretation relating to whether Varnes was an "employee." Thus, there would have been no need for him to resort to facts outside the administrative record in order to demonstrate his right to a hearing. The only purpose of such a hearing would have been to allow argument of the same legal principles that he was entitled to argue on appellate review of the suspension of benefits. In sum, had Varnes sought his exclusive remedy under the Administrative Procedure Act in a timely fashion, he would have been able to assert all the contentions necessary to achieve the same result he seeks now. In addition, if his position was meritorious, he would have had no reason to rely on his current due process theory. *Cf. Vandenplas v. City of Muskego,* 753 F.2d at 559-60 (unavailability of damages in prior state suit irrelevant for *res judicata* purposes, since if plaintiffs had raised con-

stitutional issues in state court and prevailed, no damages would have arisen.[1]

Varnes also contends that the doctrine of *res judicata* cannot preclude him from bringing the present suit because the prior state court suits did not result in final judgments on the merits. Plaintiff argues that under Illinois law, a trial court's order is no longer a judgment on the merits once it is reversed by an appellate court, citing cases in which the appellate court either vacated, or reversed and remanded, a trial court's order. Here, however, although both Illinois appellate courts reversed the lower courts' judgments, each opinion remanded with specific directions to dismiss the respective complaints, *Varnes v. Lentz,* 30 Ill. App. 3d at 811, 332 N.E.2d at 643; *Varnes v. Dougherty,* 39 Ill. App. 3d at 479, 350 N.E.2d at 10. Plaintiff argues that the existence of a prior judgment has not been established because the defendants have not placed in the record actual judgments dimissing the actions after remand from the appellate courts. This hypertechnical argument seems to us not persuasive. Both state appellate courts remanded with specific directions to dismiss plaintiff's complaint, and the circuit courts on remand would have authority only to follow the appellate courts' mandate precisely and dismiss the complaints, *see e.g. People ex rel. Daley v. Schreier,* 92 Ill. 2d 271, 442 N.E.2d 185 (1982). Under these circumstances, where the circuit courts' only

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[1] We note, however, that this line of reasoning might not be applicable in a case in which the denial of a hearing itself might prejudice a plaintiff's ability to demonstrate a meritorious position on administrative review; in such a case the federal cause of action for deprivation of due process might indeed be different from the cause of action pursued before the state courts on administrative review.

function was to perform such a ministerial, nondiscretionary act, we think it should make no difference for purposes of determining finality that we have no evidence before us that the courts actually did so.

III.

Plaintiff also presses us to recognize a "declaratory judgment exception" to traditional *res judicata* principles. This would entail that the previous state court suits for declaratory judgments would bar only relitigation of issues actually decided in them, but would not preclude plaintiff from seeking additional relief in this federal suit that was not pursued in the prior suits. *See Restatement (Second) of Judgments,* § 33 (1982). The decision in *Mandarino v. Pollard,* 718 F.2d at 845, persuades us to reject plaintiff's argument. In that case as in this one, plaintiff did not raise his declaratory judgment exception theory in response to defendants' motion for summary judgment in the district court. The general rule is that arguments not raised in the trial court cannot be raised for the first time on appeal. *Id.* at 848.

Here in fact plaintiff pressed the declaratory judgment theory for the first time in his Rule 59(e) motion to reconsider the summary judgment in favor of defendants. But this is not the equivalent of raising the argument before the district court when it was first considering the cross-motions for summary judgment. Motions for reconsideration serve a limited function, and, except for reasons not apparent here, should not be used as an occasion to tender new legal theories for the first time. *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.,* No. 84-1515 (7th Cir. 1985) (quoting *Keene Corp. v. Inter-*

national Fidelity Insurance Co., 561 F. Supp. 656, 665-66 (N.D. Ill. 1982), *aff'd*, 736 F.2d 388 (7th Cir. 1984)). The questions whther a declaratory judgment exception to traditional *res judicata* principles should be recognized, and, if so, its scope and application, have yet to be considered by Illinois courts, and are complex. *See Mandarino v. Pollard*, 718 F.2d at 848-49. We therefore believe it inappropriate, lacking any treatment of them by the court below, to address or decide these questions. We think the argument with respect to the declaratory judgment exception may be regarded as waived.[2]

For these reasons, we conclude that the doctrine of *res judicata* is fully applicable, and bars plaintiff's suit. Accordingly the judgment of the district court is AFFIMED.[3]

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[2] In any event, even if we were to consider plaintiff's argument on its merits, and even if we concluded that Illinois would recognize some form of a declaratory judgment exception, we doubt that such an exception would be applicable to the facts of this case. Here all of plaintiff's rights with respect to coercive relief became fixed when his pension benefits were suspended. Under these circumstances, allowing him to bring a suit for coercive relief after he unsuccessfully pursued a declaratory judgment action would appear to undermine the policies supporting the doctrine of *res judicata* without materially furthering the rationale behind the declaratory judgment exception. *Cf. Restatement (Second) of Judgments* § 33(c) (1982) (court should lean toward declining declaratory judgment action if another remedy such as coercive relief on existent claim is plainly available and would have wider *res judicata* effects, but declaratory judgment exception probably still applicable if court allowed declaratory judgment action to proceed.)

[3] Given our disposition of the case on *res judicata* principles, we do not reach plaintiff's due process arguments. We note, however, that plaintiff's due process claim of entitlement to

(Continued on following page)

(Continued from previous page)

a pre-suspension hearing is seriously weakened by his inability to point to any disputed fact that such a hearing might have resolved. "The purpose of a prior evidentiary hearing in the entitlement context is to resolve those questions of fact upon which a controversy turns; if there are no material issues of fact to be resolved, a prior evidentiary hearing to determine the existence of facts is meaningless, and the very purpose of requiring procedural due process guarantees evaporates." *Geneva Towers Tenants Organization* v. *Federated Mortgage Investors*, 504 F.2d 483, 495 (9th Cir. 1974) (dissenting opinion). *See Edison* v. *Pierce*, 745 F.2d 453, 459-60 (7th Cir. 1984) (view of dissenting opinion in *Geneva Towers* consistently followed in this circuit). *See also Green* v. *Finley*, 749 F.2d 467 (7th Cir. 1984) (Grievant need not be provided opportunity to present evidence to support arguments where essential facts surrounding dispute were previously resolved).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
77 C 4481

BLAIR VARNES,

Plaintiff,

v.

GEORGE FOSS FORBES, JR., Individually and as Chairman of the Illinois State Employees Retirement System and the Board of the State Employees Retirement System, and MICHAEL MORY, Individually and as Executive Secretary of the Illinois State Employees Retirement System and the Board of State Employees Retirement System, MICHAEL BAKALIS, DONALD THANNEN, CLASCENNA HARVEY, THEODORE PUCKORIOUS, WILLIAM M. DOYLE, President of the Retirement Board, Cook County Employees Annuity and Benefit Fund; THOMAS BECK, ROBERT SOLDAT, and EDWARD ROSEWELL, Individually and as Trustee of said Retirement Board, Cook County Employees Annuity and Benefit Fund, and ROBERT A. MORAN, Individually and as Secretary and Treasurer of said Retirement Board, Cook County Employees Annuity and Benefit Fund,

Defendants.

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge:

This matter is before the court on cross motions for summary judgment. For the reasons stated below, the state and county defendants' motions for summary judgment are granted and plaintiff's motion for summary judgment is denied.

This case is the third action plaintiff has instituted concerning the denial of certain retirement benefits. In 1971, the pension benefits plaintiff had been receiving were suspended. He then filed an action against the state defendants in the Circuit Court of DuPage County seeking a declaratory judgment that he was entitled to continue to receive his retirement benefits. That litigation terminated when the Illinois Appellate Court held that plaintiff's only form of review was an administrative review action and that plaintiff's complaint was not filed within the requisite time period for such a review. *Varnes v. Lentz*, 30 Ill. App. 3d 806, 332 N.E.2d 639 (2d Dist. 1975). While that case was pending, plaintiff filed an action in the Circuit Court of Cook County against the county defendants. That complaint also sought a declaratory judgment that plaintiff's retirement benefits had been wrongfully terminated. On appeal, the second complaint suffered the same fate as the first complaint. The Illinois Appellate Court followed the earlier panel opinion from the Second District and held that plaintiff's only method of review was pursuant to the Illinois Administrative Review Act

and that plaintiff's complaint was not timely for such an action. *Varnes v. Dougherty*, 39 Ill. App. 3d 476, 350 N.E. 2d 6 (1st Dist. 1976) (*"Varnes II*). In both cases, the courts ordered plaintiff's complaints dismissed.

Having been unsuccessful in restoring his retirement benefits in his two state court actions, plaintiff filed this action pursuant to 42 U.S.C. § 1983.[1] The complaint alleges that plaintiffs' constitutional rights have been violated in two respects. First, plaintiff contends that the statute upon which defendants relied for suspending plaintiff's retirement benefits is unconstitutionally vague.[2] Second, plaintiff argues that he was denied procedural due process of law when his benefits were suspended because he did not receive notice and was not given an opportunity to be heard before the benefits were suspended.

The facts are not in dispute and most of them are reported in the two Illinois Appellate Court decisions. Plaintiff earned retirement benefits from the County of Cook and the State of Illinois. After retiring, plaintiff began receiving county benefits in 1962. Two years later, state benefit payments commenced. In 1970, plaintiff exercised an option to accept certain alternative provisions of the Retirement Systems Reciprocal Act, Ill. Rev. Stat. ch. 108 ½, § 20-101 et seq. These provisions resulted in a recomputation of plaintiff's benefits and a lump sum pay-

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[1] The complaint also lists several other statutory references, including 42 U.S.C. §§ 1981, 1985, 1986 and 29 U.S.C. § 1132. Plaintiff, however, has not indicated the relevance of those other sections.

[2] This claim is not relied on in plaintiff's motion for summary judgment. Plaintiff has never fleshed out his theory of vagueness and the court finds no merit in the allegation.

ment for retroactive benefits. On May 1, 1971, plaintiff was appointed a magistrate in the Eighteenth Judicial Circuit, DuPage County. This appointment prompted the defendants to suspend plaintiff's retirement benefits. The suspension was based on section 20-125 of the Illinois Pension Code, Ill. Rev. Stat. ch. 108½, § 20-125 ("§ 20-125"). That section provides in pertinent part:

> If a retired employee returns to employment which is covered by a system from which he is receiving a proportional annuity under this Article, his proportional annuity from all participating systems shall be suspended during the period of re-employment.

Plaintiff did not receive any notice that defendants were going to suspend his benefits before the suspension. Thus, he was given no opportunity to be heard on the issue of whether his benefits should be suspended. The first notice plaintiff received of the suspension was a letter from the Secretary of the State Employees' Retirement System of Illinois to the Head Clerk of the County Employees' Annuity & Benefit Fund of Cook County. The letter is dated October 19, 1971 and plaintiff is designated on the letter as receiving a carbon copy. The letter notes both plaintiff's appointment as a magistrate and § 20-125, and it states that plaintiff has been removed from the state pension roll. Plaintiff then sought further information concerning the suspension and he received an explanation of it in a letter dated January 18, 1972 from the Secretary of the State Employees' Retirement System of Illinois.

In his motion for summary judgment, plaintiff argues that the undisputed facts demonstrate that he was denied procedural due process under *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Wendl v. Moline Police Pension Board*,

96 Ill. App. 3d 482, 421 N.E.2d 584 (3d Dist. 1981). In their motions for summary judgment, defendants raise several arguments that would be dispositive without addressing the issue of what process plaintiff was due with the respect to the suspension of benefits and they alternatively argue that plaintiff was accorded due process. The court finds two of defendants' arguments persuasive and only those will be discussed.

The doctrine of *res judicata* applies to civil rights actions brought under 42 U.S.C. § 1983. *Lee v. City of Peoria* (*"Lee"*), 685 F.2d 196 (7th Cir. 1982). Thus, just as in other types of cases, "a final judgment on the merits in a court of competent jurisdiction bars the same parties or their privies from relitigating not only the issues which were in fact raised and decided but also all other issues which could have been raised in the prior action." *Id.* at 199. Three elements must be present for the doctrine of *res judicata* to apply: (1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits. *Id.*

Regarding the first element, an earlier "dismissal for want of jurisdiction does not preclude a court of competent jurisdiction from reaching the merits of the claim in a subsequent suit". *Harper Plastics v. Amoco Chemicals Corp.* (*"Harper"*), 657 F.2d 939, 943 (7th Cir. 1981). However, a judgment based on a statute of limitations is "on the merits". *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1330 & n.3 (9th Cir. 1981). With respect to the second element of the doctrine of *res judicata*,

> a cause of action consists of a single core of operative facts which give the plaintiff a right to seek redress

> for the wrong concerned. Even though one group of facts may give rise to different claims for relief upon different theories of recovery, there remains a single cause of action. If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted, and *res judicata* bars the latter section.

Lee, 685 F.2d at 200. *Res judicata* operates to bar litigation of matters that were or should have been raised in a prior proceeding. A litigant cannot split a single cause of action and use several grounds for recovery under the same action as the basis for separate suits. Thus, an unsuccessful party may not "frustrate the doctrine of *res judicata* by cloaking the same cause of action in the language of a theory of recovery untried in the previous litigation". *Harper*, 657 F.2d at 945.

In this case, the doctrine of *res judicata* applies. The parties are the same as the parties in the two state court actions. Additionally, the cause of action in the earlier litigation and this suit are the same because a single core of operative facts gives plaintiff a right to seek redress. Further, the earlier state court actions were final judgments on the merits because the courts determined that plaintiff had not timely filed the actions and they were ordered dismissed. Moreover, in *Varnes II* the court reached the merits of plaintiff's contention with respect to the alleged unlawful deprivation of vested rights in the retirement benefits.[3] Therefore, plaintiff is barred from bringing this action.

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[3] Even though the Illinois courts considered plaintiff's state court complaints as administrative review actions, those courts had "a duty, under the Administrative Review Act, to ensure that due process and an impartial adjudication were afforded in the administrative hearing". *Lee*, 685 F.2d at 201.

Alternatively, even if this action is not barred, a separate issue entitles defendants to summary judgment. "The first inquiry in any § 1983 suit is whether the plaintiff has been deprived of a right secured by the Constitution and laws of the United States". *Reichenberger v. Pritchard,* 660 F.2d 280, 284-85 (7th Cir. 1981). In this case, plaintiff alleges that he was deprived of property without due process of law. However, before determining the amount of process plaintiff was due, plaintiff must first establish that he was deprived of a property interest within the meaning of the due process clause. *See Brookhart v. Illinois State Bd. of Education,* 697 F.2d 179, 184-88 (7th Cir. 1983); *DiIulio v. Board of Fire and Police Commissioners,* 682 F.2d 666, 668-70 (7th Cir. 1982); *Shango v. Jurich,* 681 F.2d 1091, 1097-1103 (7th Cir. 1983). Property interests are not created by the Constitution. Rather, they are created and defined by state law. *Board of Regents of State College v. Roth,* 408 U.S. 564, 577 (1972). In this case, the Illinois Appellate Court determined that whatever entitlement plaintiff had to the retirement benefis before 1970, when plaintiff elected to receive benefits under the Retirement Systems Reciprocal Act, his rights to the benefits were subject to the provisions and conditions of that act. *Varnes v. Dougherty,* 39 Ill. App. 476, 350 N.E.2d 6, 9-10 (1st Dist. 1976). One such condition is that benefits are suspended if plaintiff is re-employed by a covered employer. Thus, plaintiff's only claim of entitlement is one of continued benefits as long as he was not re-employed. There is no dispute that plaintiff was re-

employed and that that re-employment was the basis of the defendants' action to suspend benefits.[4] Therefore, plaintiff has not shown a property interest which implicates federal due process protections, and defendants are entitled to judgment.

Accordingly, defendants' motion for summary judgment are granted and plaintiff's motion for summary judgment is denied.

/s/ Joel M. Flaum
United States District Judge

DATED: May 30, 1983

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[4] Even if plaintiff had a right to be heard on the factual issue of whether he was re-employed, that issue was never in dispute. Thus, no injury resulted from the lack of a pre-suspension hearing. Plaintiff apparently challenged only whether employment as a magistrate or judge was exempted under the provisions of the statute.

Name of Presiding Judge, Honorable George N. Leighton.

Cause No. 77 C 4481. Date November 18, 1983.

Title of Cause: Blair Varnes v. George Forbes, Jr., et al.

Brief Statement of Motion: Order ruling on motion to alter, amend or reconsider.

> The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel:

Representing:

Names and Addresses of other counsel entitled to notice and names of parties they represent:

Reserves pace below for notiations by minute clerk

The matter comes before the Court on plaintiff's motion under Rules 52(b) and 57, Fed. R. Civ. P., to alter, amend, or reconsider an order of Judge Flaum granting summary judgment in favor of all defendants. The Court, having carefully reviewed the parties submissions and oral arguments, concludes that plaintiff has failed to show that Judge Flaum's decision was clearly erroneous. Accordingly, the motion is denied.